

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1907

No. 1770

482

No. 2 SPECIAL CALENDAR

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ALICE BROOKE

Appeal from the Supreme Court of the
District of Columbia

Filed March 21, 1907

April 10. 1907

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1907

No. 1770

No. 2 SPECIAL CALENDAR

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ALICE BROOKE

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Supreme Court of the District of Columbia

Law No. 48870.

ALICE BROOKE, PETITIONER

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

UNITED STATES OF AMERICA, *District of Columbia*, ss:

BE IT REMEMBERED, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause to wit:

1 *Petition.*

Filed October 17, 1906.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE, PETITIONER

vs.

THE DISTRICT OF COLUMBIA, RESPONDENT.

To the Supreme Court of the District of Columbia, holding a Circuit Court:

The Petition of Alice Brooke respectfully represents to the Court as follows:

First: That she is now a resident of Silver Spring in the State of Maryland. That the respondent is a Municipal Corporation duly created.

Second: That petitioner is the owner in fee simple of sub lot numbered twenty-six (26) in square numbered seven hundred and seventy (770) in said District, improved by five dwelling

houses numbered 1243, 1245, 1247, 1249 and 1251 Third Street, Southeast.

Third: By Act of Congress entitled "An Act to provide for the drainage of lots in the District of Columbia," approved May 19, 1896, it is provided that each original lot or subdivisional lot situated on any street in the District of Columbia where there is a public sewer shall be connected with said sewer * * * and if such original lot or subdivisional lot is situated on any street in said District where there is a public sewer and watermain, such original lot or subdivisional lot shall
2 be connected with said sewer and also with said watermain.

Sections 2 and 3 of said Act require the Commissioners of said District to notify the resident owner or owners of every lot required by said Act to be so connected, to have said work done, and in the event of the neglect to make such connections within a prescribed time such owner or owners is to be deemed guilty of a misdemeanor and on conviction in the Police Court of said District is to be punished by a fine for each day after the expiration of the limited prescribed time till the connections are made.

By the 4th section of said Act it is provided that in case the owner of such lot being a non resident of the District of Columbia cannot be found within said District, the said Commissioners are to give notice, by publication twice a week for two weeks in some daily newspaper published in the city of Washington, to such owner directing the connection of such lot with such sewer or sewer and watermain, as the case may be, with the proviso, however, that if the residence or place of abode of said non-resident owner be known, or ascertainable on reasonable inquiry, then a copy of the aforesaid notice is to be mailed to said non resident, legal postage prepaid, addressed at his said residence or abode, and in case such owner shall neglect to comply with the notice within thirty days, said Commissioners are to cause such connections to be made, the expense to be paid out of the emergency fund; such expense with the necessary expenses of advertisement shall be assessed as a tax against such lot, which tax shall be carried on the regular tax roll of
3 the said District and shall be collected in the manner provided for the collection of other taxes.

Fourth: By virtue of said Act it is claimed on the part of the respondent, that certain connections, respecting said parcel of land, were made with the watermain and sewer in the street on which said lot fronts and respondent has assessed or caused to be assessed the charge therefor at the sum of \$470.77 and have caused said assessment to be placed against said parcel of land

on a book in the office of the Assessor of Taxes for said District, designated "Special Reimbursable Tax Ledger" in the name of your petitioner as owner; said assessment or tax against said lot will appear by bill furnished petitioner by the Collector of Taxes for said District hereto annexed as part hereof.

Fifth: Petitioner avers that said assessment or tax against said lot or parcel of land is illegal in its entirety and beyond the power of the respondent to assess or collect, in this that respondent had no jurisdiction of aforesaid property under aforesaid Act of Congress, to require the connection of said property, or cause the same to be done, with the sewer and watermain in the street in front of said property; the said Act of Congress being unconstitutional and void because it discriminates between owners of real estate in said District; the said Act not being uniform and capable of universal enforcement.

Sixth: Upon information and belief petitioner further avers that assuming said Act is valid, which is denied, still said assessment or tax is void in its entirety in this that the provisions of the fourth section of said Act—which are a prerequisite to the causing of said work to be done by the Commissioners—
4 were not complied with in the following particulars—

(a) It does not appear that petitioner was a non-resident at the time the work was done for which aforesaid assessment was made or that she could not be found in said District.

(b) It does not appear that the Commissioners of said District, either as a board of individuality, gave the legal and official notice to the owner of said property as is required by said Act.

(c) It does not appear what the different items are, in connection with said work, which go to make the assessment levied against said property, nor does it appear that proper proposals were obtained after proper notice or that the contract for the work was given to the lowest bidder, or that the contract given was made by the Commissioners of said District sitting as a board, all of which petitioner contends is absolutely necessary for a valid assessment.

(d) That in and by the purported published notice to said petitioner it is not stated when the period of thirty days within which the connections were to be made would begin to run.

(e) The aforesaid assessment has not been placed on the regular tax rolls of said District.

Seventh: That petitioner, notwithstanding she has always, during her ownership of said property, which has been continuously since August 8, 1896, kept the same in good repair and condition, and promptly and regularly paid the taxes and

5 assessments legally levied thereon, it was only recently she learned that respondent carries the aforesaid assessment or tax on its said ledger against said property, and said property is liable to be sold for the non-payment thereof, and petitioner respectfully contends that the said Act of Congress is unconstitutional and void, and that said tax or assessment is illegal and void, not only because the Act is unconstitutional and void under which the work is alleged to have been done, but also for the reason that, assuming said Act to be valid, the Commissioners did not comply with the terms and conditions of said Act as above set forth, and that by reason of said erroneous and illegal assessment standing on respondent's said record in its office against her said property she is injured and wronged in her right of property and has no appeal from said illegal action of said respondent.

Wherefore, the premises considered, petitioner reespectfully prays:

That the United States Writ of Certiorari commanding the District of Columbia, respondent herein, to certify immediately to this Court, a copy of said Statute or Act of Congress and of each and every record and paper, and part of record and paper, in its custody, relating in any manner to charges or taxes or assessments assessed in the name of petitioner against any part of the real estate hereinbefore referred to, purporting to be charges, assessments or taxes levied under the Act of Congress of May 19, 1896, titled as aforesaid, together with a full copy of every notice, return, advertisement, contract, minutes of
6 board meeting or meetings of said Commissioners, specification, drawing, blue-print, assessment entry on tax book, name of tax book, and of such minutes or proceedings had by it concerning said matter.

2. That upon coming in of said return, after hearing, the alleged assessment or charge or tax be quashed and annulled by the judgment of this Honorable Court.

3. That petitioner may have such other and further relief in the premises as the justice of the case may require and to the Court seem proper.

ALICE BROOKE.

JNO. RIDOUT,
GEO. C. GERTMAN,
Attorneys for Petitioner.

CITY OF WASHINGTON, *District of Columbia*, ss:

I, Alice Brooke, do solemnly swear that I have read the above petition by me subscribed and know the contents thereof; that

the facts therein stated upon my personal knowledge are true and those stated upon information and belief I verily believe to be true.

ALICE BROOKE

Subscribed and sworn to before me this 17th day of October, A. D. 1906.

[SEAL]

CLARENCE F. DONOHUE,
Notary Public, D. C.

7

Rule to Show Cause.

Filed October 17, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48870

ALICE BROOKE,

vs.

THE DISTRICT OF COLUMBIA.

Upon the petition filed herein it is this eighteenth day of October, 1906, ordered:

That the respondent show cause, if any it has before this Court on Friday, October 26, 1906, why the prayer of said petition for a writ of certiorari should issue should not be granted; provided a copy of this order be served upon the said respondent on or before October 20th 1906.

THOS. H. ANDERSON,
Justice.

Marshal's Return.

Served copy of the within order on Henry B. F. Macfarland one of the Board of Commissioners of the defendant—Oct. 18, 1906.

AULICK PALMER,
Marshal.
S

Answer to Rule.

Filed November 23, 1906.

In the Supreme Court of the District of Columbia.

At Law, No. 48870.

ALICE BROOK-, Petitioner,

vs.

DISTRICT OF COLUMBIA.

The return of the respondent, the District of Columbia, to the rule issued in the above entitled cause respectfully shows as follows:

1 and 2. It admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Respondent further says that the matter set forth in paragraph three are matters of law, which are proper to be decided by the Court and which the petitioner is not required to answer.

4. Respondent admits the allegations of paragraph four.

5. Respondent says that the said assessment or tax complained of is a legal and proper tax and the defendant had a right to make the same against the property involved and to require the said property to be connected with the sewer and the water-main in the street in the front thereof; that the said Act of Congress is constitutional and legal.

6. Respondent asserts the said assessment or tax as a proper or a legal tax, and that provisions of the said Act of Congress referred to in the said petition, particularly those of the 4th section of the said Act have been strictly complied with.

9 a. Respondent says that diligent search was made by the officers and agents of the respondent to find the said petitioner within the District of Columbia, but she could not be found there after such diligent search. That the petitioner was informed and believed and still believes that the said petitioner was at the time of the performance of the acts complained of, and is now a citizen of the State of Maryland, and resides and did reside at Silver Hill, Maryland.

b. Respondent further says that the Commissioners of the District of Columbia through their officers and agents did give

legal and official notice to the said petitioner as required by the said Act of Congress. That notice was given by publication as required by the said Act and said notice was also sent to the said petitioner at Silver Hill, Maryland, postage prepaid by registered letter, on March 14, 1903, and was received by the said petitioner on March 16, 1903; the registry return receipt with the signature of the petitioner, a copy of which is filed herewith as exhibit hereto and is prayed to be read as a part hereof, and the original thereof will be exhibited to the Court on the hearing of said rule.

c. That the respondent caused certain plans and specifications for said work, to connect the said premises with the water-main and sewer, to be prepared and bids and proper proposals thereunder were duly called for by public advertisement, and a number of bids were made by different individuals for the said work, and the contract was duly let to the lowest bidder by the Commissioners for the said District, acting as a Board of Commissioners.

10 d. They deny the allegation of this paragraph, that the published notice to the petitioner notifying her to connect the said premises with the said water-main and sewer, and called upon her to do so "within thirty days from this notice."

e. That the said assessment complained of has been placed upon the regular tax-roll of the District of Columbia, which consists of ledgers, and said assessment is contained in the "special reimbursable tax-ledger" which is the proper roll on which to place said assessment, and is the only place where such assessments are carried.

7. In answer to paragraph 7, respondent says that the matters therein contained are immaterial, or matters of law. In answer to that portion of said paragraph which alleges that the Commissioners did not comply with the terms and conditions of said Act, respondent says that they did comply with the terms and conditions of said Act and petitioner is now barred by Statute of Limitations, the said assessment having been made on September 9, 1903.

8. As a further return to said petition, respondent files herewith as a part hereof marked "Return Part II" copies of record in the possession of your respondent pertaining to the said assessment, to wit:

1. Registry return receipt with signature of petitioner.
2. Copy of advertisement, notifying petitioner to connect with water-main and sewer.
3. Order of Commissioners to have the work performed.

4. Request of Inspector of Plumbing that bids for the work be advertised for.

11 5. Copy of the advertisement asking for bids for the work.

6. List of bidders and prices bid.

7. Order of Commissioners accepting bid of Freund & Anderson.

8. Plats of premises (2).

9. Copy of assessment.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
JOHN BIDDLE

Commissioners, D. C.

E. H. THOMAS,
F. H. S., Atty.

DISTRICT OF COLUMBIA, ss:

Henry B. F. Macfarland, Henry L. West and John Biddle, being duly sworn, say they are the Commissioners for the District of Columbia, and have read the return subscribed as such Commissioners and know the contents thereof; that the matters therein stated on their personal knowledge are true, and those stated on information and belief, they believe to be true.

HENRY B. F. MACFARLAND,
HENRY L. WEST,
JOHN BIDDLE,

Commissioners, D. C.

Subscribed and sworn to before me this ninth day of November, 1906.

WILLIAM TINDALL,
Notary Public, D. C.

[SEAL]

12

PART II.

Filed November 23, 1906.

Copy.

Registry Return Receipt. Form No. 1548

Received from the Postmaster at.....3/14 03.....

Registered (Parcel) No. 16943..FROM POST OFFICE AT
WASHINGTON, D. C.

Addressed to.....Miss Alice Brook.....
(Name of addressee)

Date.. March 16, 1903.

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

.....Miss Alice Brook-.....
(Signature or name
of addressee.)

.....
(Signature of addressee's
agent.)

A registered article must not be delivered to any one but the addressee, except upon addressee's written order. When the above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

This card must be neatly and correctly made up and addressed to the postoffice where the article is registered. Postmark
of Delivery
Office.

The postmaster must deliver the registered article, must see that this card is properly signed, postmarked, and mailed to the sender. (Silver Hill)
(Mar. 17)
(Washington, D. C.) (1903)
(Rec'd. Mar. 17) (Md.)
(9 P. M.) And date of De-
(1903.) livery.

POST OFFICE DEPARTMENT.

Official Business.

Penalty of \$300 for private use.

RETURN TO

Name of sender.....Health Dept.

Street and number of D. Commrs.

or Postoffice Washington, D. C.

Box.

EXECUTIVE OFFICE

COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

WASHINGTON.

November 3, 1906.

I hereby certify that the following notice to connect sewer and watermain, was published in the Washington Evening Star, on March 11th, 12th, 18th and 19th, 1903:

OFFICE OF THE COMMISSIONERS OF

the District of Columbia, Washington, March 11, 1903. Notice to connect lots in the city of Washington, District of Columbia, with sewers and water-mains: To * * * Alice Brooke, owner of lot 26, in square 770 (embracing premises known as 1243, 1245, 1247, 1249 and 1251 3d street southeast); * . * * You, and each of you, are hereby notified to connect the lot or lots above mentioned, and owned by you, respectively, with the public sewer and watermain in such a manner that any and all drainage of such lots, whether water or liquid refuse of any kind, shall flow into said sewer; the work to be done in accordance with the regulations governing plumbing and house drainage in the District of Columbia, and in case you shall fail or neglect so to do within thirty days from this notice the Commissioners of the District of Columbia will cause such connection to be made, and will assess the expense of the same, together with the expense of this advertisement, as a tax against each lot aforesaid, respectively, according to the provisions of the Act of Congress entitled "An act to provide for the drainage of lots in the District of Columbia," approved May 19, 1896. H. B. F. MACFARLAND, HENRY L. WEST, JOHN BIDDLE, Commissioners of the District of Columbia.

WILLIAM TINDALL,

Secretary to the Board of Commissioners of the District of Columbia.

14

Filed November 23, 1906.

C. O. 240267-I

EXECUTIVE OFFICE

COMMISSIONERS OF THE DISTRICT OF COLUMBIA.

WASHINGTON, May 19, 1903.

Ordered:

That the owners of the following described premises having been notified by publication, in accordance with law, to connect their premises with the public sewer and watermain and having failed to make such connections within the period specified by law, the necessary work will be done by the District of Columbia in so far as the appropriation to provide for the drainage of lots in the District of Columbia will permit and the cost thereof will be assessed against the respective premises as provided by law, viz:

Lot 26, square 770 (embracing premises known as 1243, 1245, 1247, 1249, and 1251 3rd street, southeast), Alice Brooke, owner.

*

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*

*

Official copy furnished Engineer Department.

By order,

[SEAL]

WILLIAM TINDALL,

Official Copy

Secretary.

W. TINDALL, *Sec'y.*

15

Filed November 23, 1906.

OFFICE OF THE
ENGINEER COMMISSIONER OF THE DISTRICT OF COLUMBIA,
WASHINGTON

June 18th, 1903.

THE HONORABLE COMMISSIONERS, (through Capt. Harding.)

GENTLEMEN: I have the honor to request that the enclosed advertisement be placed in the daily papers. The work proposed to be contracted for is ordered under date of May 19th, 1903, (C. O. 240267-1) E. D. 44291, and the cost of the same will be assigned against the property under the provisions of the Act for the "Drainage of Lots." It is also presumed that the cost for advertising may be equitably charged against the property.

Very respectfully,

[SEAL]

H. B. DAVIS,

Official Copy

Inspector of Plumbing, D. C.

W. TINDALL, *Sec'y.*

16 . Office, Commissioners, District of Columbia, Washington, D. C., June 19th, 1903, SEALED PROPOSALS will be received at this office until 12 M, Saturday, June 27th, 1903, for connecting certain premises with sewer and watermain. Forms, specifications and necessary information may be obtained at this office. Henry B. F. Macfarland, Henry L. West, John Biddle, Commissioners of the District of Columbia.

[SEAL]

Official Copy.

W. TINDALL, *Sec'y.*

17

Filed November 23, 1906.

Bids for the work of connecting premises 1243 to 1251, inclusive, 3d St. S. E., being lot 26, Square 770, as per advertisement of March 11-19, 1903, were received as follows:

NAME	AMT. OF BID.
Wm. Rothwell & Son	\$627.00
The E. F. Brooks Co.	593.20
Hutchinson & McCarthy	575.00
Dunegan Plumbing Co.	548.
Freund & Anderson	470.77

18

Filed November 23, 1906.

E. D. 44913

EXECUTIVE OFFICE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
WASHINGTON.

June 30, 1903.

Ordered:

That the proposal of Freund and Anderson under date June 26, 1903, to furnish all the necessary materials and labor and perform the following work in strict accordance with the specifications, at the prices given below, are hereby accepted:

* * * * *

For connecting 5 premises Nos. 1423 to 1251, inclusive, 3rd street, S. E., located on lots 26, square 770, with public sewer and water main; furnishing for each premises a water closet (Class I), a water closet enclosure complete and a cesspool; new G. I. gutters and down spouts on rear of 1245 to 1251, inclusive, and rehanging gutter on rear of 1243; a 4-inch house sewer and 3-4" water supply line will be installed in 3 premises and repairs to fences will be made, together with all fittings, connections, materials and labor, necessary to complete, for the sum of \$470.77.

Official copy furnished Engineer Department.

By Order:

WILLIAM TINDALL,
Secretary.

[SEAL]

M
Auditor
Eng'r. Dept.
Freund & Anderson

Official Copy,
W. TINDALL, *Sec'y.*

19

Filed November 23, 1906.

OFFICER OF ASSESSOR, D. C.

Book. S. R. Tax
Folio 100

September 9, 1903.

ALICE BROOK-

TO THE DISTRICT OF COLUMBIA, DR.

Square 770,

Lot Sub 26

For work done under Act of Congress approved—

May 19, 1896

Description of work—Connecting premises with water-main
and Sewer.

\$470.77

Interest at.....per cent from.....

Total.....

P

Received payment,

.....
Collector of Taxes.

20 Supreme Court of the District of Columbia.

Friday, December 7, 1906.

Session resumed pursuant to adjournment, Hon. Thos. H.
Anderson, Justice, presiding.

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No. 48870 At Law.

ALICE BROOKE, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

This cause came on to be heard upon the petition, the rule to show cause issued thereon, the answer of respondent thereto, and after argument thereon by counsel for the respective parties, was submitted to the Court for its consideration. Whereupon it is ordered that the prayer of the petition herein for a Writ of Certiorari be and is hereby granted, and said writ is hereby ordered to issue in accordance therewith.

14 ALICE BROOKE VS. THE DISTRICT OF COLUMBIA

21 *Stipulation for Hearing, etc.*

Filed January 11, 1907.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE,

v.

THE DISTRICT OF COLUMBIA.

It is hereby stipulated that the Respondent will on or before Friday, January 18, 1907, file herein its return to the Writ of Certiorari heretofore issued herein, and that on said 18th day of January, 1907, said cause may, if agreeable to the Court, be heard upon its merits, and that copies of the records filed herein shall stand in the place and stead of the originals.

JOHN RIDOUT,

Atty. for Respondent,
E. H. THOMAS,
F. H. S.

Attys. for Pet.

22

Motion.

Filed January 16, 1907.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE,

vs.

THE DISTRICT OF COLUMBIA.

Now comes the petitioner by her Attorneys, John Ridout and George C. Gertman, and on the return of the respondent herein to the Rule to show cause moves the Court to enter a judgment quashing the tax complained of in the petition herein.

JOHN RIDOUT,

GEO. C. GERTMAN,

Atty's. for Petitioner.

Jan. 11, 1907.

23

Return to Writ of Certiorari.

Filed January 21, 1907.

In the Supreme Court of the District of Columbia.

At Law, No. 48870.

ALICE BROOK-,

?

v.

THE DISTRICT OF COLUMBIA.

Now comes the defendant, by its attorney, and for return to the writ of certiorari herein, adopts in full the return to the rule to show cause, heretofore filed in this case.

E. H. THOMAS

F. H. STEPHENS,

Attorneys for Defendant.

24

Supreme Court of the District of Columbia.

Friday, February 8, 1907.

Session resumed pursuant to adjournment, Hon. Thos. H. Anderson, Justice, presiding.

*

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No. 48870 At Law.

ALICE BROOKE, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Def't.

This cause having been argued by counsel for and submitted to the Court on the Writ of Certiorari and the return thereto filed herein by Respondent, it is by the Court, this Eighth day of February, 1907, adjudged that the tax or assessment of \$470.77 levied against sub lot numbered twenty-six (26) in square numbered seven hundred and seventy (770), in said District, belonging to Petitioner, for connecting said property with water and sewer, is illegal and void, and said tax or assessment for said work is hereby quashed and held for naught

and respondent is forthwith directed to cancel the same on its tax records.

From the foregoing the respondent in open court, notes an appeal to the Court of Appeals.

25

Order for Transcript of Record.

Filed February 13, 1907.

In the Supreme Court of the District of Columbia.

At Law, No. 48870.

ALICE BROOKE,

v.

DISTRICT OF COLUMBIA.

The Clerk will please prepare a transcript of the record in the above entitled case, for the Court of Appeals, consisting of:

1. The petition.
1. The rule to show cause why the writ should not issue.
3. The answer to the rule; two parts
4. Order directing the writ to issue
5. Answer to the writ
6. Motion to quash return
7. Judgment, quashing return and directing cancellation of the assessment, and
8. The appeal noted in open court
9. This order for transcript.

E. H. THOMAS,
F. H. STEPHENS,
Attorneys for the Defendant.

26. Supreme Court of the District of Columbia

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 25, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, a copy of which is made part of this transcript, in cause No. 48870 At Law, wherein Alice Brooke, is Petitioner, and The District

of Columbia, is Respondent, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 20th day of March, A. D., 1907.

JOHN R. YOUNG,

[SEAL]

Clerk.

[Endorsed on cover:] District of Columbia, Supreme Court. No. 1770. The District of Columbia, Appellant *vs.* Alice Brooke. Court of Appeals, District of Columbia. Filed Mar. 21, 1907. Henry W. Hodges, Clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS, DISTRICT OF COLUMBIA:

APRIL TERM, 1907.

No. 1770.

No. 2 Special Calendar.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ALICE BROOKE.

FILED APRIL 6, 1907.

Court of Appeals of the District of Columbia.

No. 1770.

DISTRICT OF COLUMBIA,

v.

ALICE BROOKS.

The parties hereto, by their counsel, consent that the transcript of record filed in the above case may be amended by adding thereto the writ of certiorari issued by the court below, and

that the said writ shall be treated as if it had been originally filed with the transcript of record herein.

E. H. THOMAS,
F. H. STEPHENS,

Attorneys for District of Columbia.

JNO. RIDOUT,
GEO. C. GERTMAN,

Attorneys for Alice Brooks.

Writ of Certiorari.

In the Supreme Court of the District of Columbia.

Law No. 48870.

ALICE BROOKE, Petitioner,

vs.

THE DISTRICT OF COLUMBIA, Respondent.

The President of the United States of America to the District of Columbia, Greeting:

You, the District of Columbia, are commanded to certify to this Court immediately, a copy of each and every part of the record in your custody relating in any manner to a charge or charges, tax or assessment, in the name of Alice Brooke, against subplot No. Twenty-six (26) in Square numbered Seven hundred and seventy (770) in the City of Washington, District of Columbia, for connecting said Lot with sewer and water main, made and done under supposed authority of the Act of Congress approved May 19, 1896, titled "An Act to provide for the drainage of lots in the District of Columbia," including all notices, returns, advertisements, contracts, specifications, drawings, blue prints, assessments, entry or entries on tax book, name of tax book, and all minutes or proceedings had by said Respond-

ent or the Commissioners of the District of Columbia, as a Board or otherwise, concerning said matter.

Witness the Honorable HARRY M. CLABAUGH, Chief Justice of the Supreme Court of the District of Columbia, this 7th day of December, A. D. 1906.

[SEAL.]

J. R. YOUNG, *Clerk*,
By FRED. C. O'CONNELL, *Asst. Clerk*.

Marshal's Return.

Served copy of the within writ on the District of Columbia by service on Henry L. West, one of the Commissioners of said District of Columbia, personally, Dec. 7, 1906.

AULICK PALMER,
Marshal.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, ss:

I, JOHN R. YOUNG, Clerk of the Supreme Court of the District of Columbia, do hereby certify the foregoing to be a true copy of the WRIT OF CERTIORARI, issued on the 7th day of December, A. D. 1906, in cause No. 48870, AT LAW, wherein ALICE BROOKE, is Petitioner, and THE DISTRICT OF COLUMBIA, is Respondent, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 5th day of April, A. D. 1907.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHMAN, *Asst. Clk.*

[Endorsed:] No. 1770. The District of Columbia, Appellant, vs. Alice Brooke. Addition to Record for Stipulation of Counsel. Court of Appeals, District of Columbia, filed Apr. 6, 1907. Henry W. Hodges, Clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA,
FILED

APR 11 1907

Henry W. Hodges,
clerk.

Court of Appeals, District of Columbia

APRIL TERM, 1907

No. 1770

No. 2, Special Calendar

THE DISTRICT OF COLUMBIA, APPELLANT

V.

ALICE BROOKE

Brief for the Appellant

E. H. THOMAS

F. H. STEPHENS

Attorneys for Appellant

Court of Appeals, District of Columbia

APRIL TERM, 1907

No. 1770

No. 2 Special Calendar

THE DISTRICT OF COLUMBIA, APPELLANT

v.

ALICE BROOKE

Brief for the Appellant

STATEMENT OF THE CASE

This is a petition for a writ of certiorari requesting the cancellation of certain assessments made against the property of the petitioner (appellee) for work done thereon by the appellant, the District of Colum-

bia, under the authority of the Act of May 19, 1896, commonly known as "The Drainage Act."

The petition recites that the appellee is a resident of Maryland and the owner of a row of five houses in the southeast section of the city; that the Commissioners of the District undertook to connect the said premises with watermain and sewer, under the authority of the said Act, which Act is unconstitutional and void because of discrimination between owners of real estate in the District; and that the assessments laid upon the said property because of the said work is invalid because of certain irregularities specified. (Record, p. 3.)

A rule to show cause why the writ of certiorari should not issue was obtained. A return to the rule was made, consisting of two parts—Part I, a formal answer under oath to the petition, and, Part II, copies of the official papers and records in the custody of the appellant pertaining to the said work and assessment. After argument, the writ was ordered to issue. Thereupon the appellant adopted in full as its return to the writ, the return already filed to the rule to show cause, and argument was again had, judgment rendered quashing the assessment, and appeal in open court.

The Court decided two questions: 1st, that the formal answer of the Commissioners could not be considered a part of the return. 2d, that there was no notice to the appellee, as required by the Act.

The Court also said, without holding, that the Act was unconstitutional because of the discrimination between property owners.

Part I of the return shows that the appellee could not be found in the District after diligent search, and that she was at the time of the performance of the acts complained of a resident of Silver Hill, Md.; that she was given the notice, as required by the Act, which was sent her by registered mail to Silver Hill, Md.,

postage prepaid, and the registry return card with her signature thereon is exhibited; that the respondent caused plans and specifications to be prepared for the execution of the work of connecting the said premises with the sewer and watermain, proposals for the said work were called for by advertisement, and the work let to the lowest bidder, and was duly performed. The irregularities alleged in the petition are denied. (Record, p. 6-7.)

Part II of the return contains the registry return receipt, a copy of the advertisement with the certificate of the secretary to the Commissioners that the notice was so advertised, order of the Commissioners to have the work performed, request of the Inspector of Plumbing that bids be advertised for, a copy of such advertisement, the bids received, the acceptance of the lowest bid, and a copy of the assessment of the cost of the work against the property.

For the convenience of the Court, the Act, which is a brief one, is reproduced *in extenso*.

. An Act to provide for the drainage of lots in in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each original lot or subdivisional lot situated on any street in the District of Columbia where there is a public sewer shall be connected with said sewer in such manner that any and all of the drainage of such lot, whether water or liquid refuse of any kind, except human urine and fecal matter, shall flow into said sewer; and if such original lot or subdivisional lot is situated on any street in said District where there is a public sewer and water main, such original lot or subdivisional lot shall be connected with said sewer and also with said water main in such manner that any and all of

the drainage of such lot, whether water or liquid refuse of any kind shall flow into said sewer: *Provided*, That the connections required to be made by this Act shall be made under the following conditions: When there is on any such original lot or subdivisional lot aforesaid any building used or intended to be used as a dwelling, or in which persons are employed or intended to be employed in any manufacture, trade, or business, or any stable, shed, pen, or place where cows, horses, mules, or other animals are kept, then, and in that instance, such original lot or subdivisional lot shall be connected with a public sewer and water main or with a public sewer, as may be required with this Act; and whenever there is no such building, stable, shed, pen, or place, as aforesaid, on such original lot or subdivisional lot, then such lot shall be required to be connected with a public sewer only when it has been certified by the health officer of said District that such connection is necessary to public health.

SEC. 2. That it shall be the duty of the Commissioners of said District to notify the owner or owners of every lot required by this Act to be connected with a public sewer or water main, as the case may be, to so connect such lot, the work to be done in accordance with the regulations governing plumbing and house drainage in said District.

SEC. 3. That if the owner or owners of any such lot neglect or refuse to make such connections as are required by this Act within thirty days after the receipt of such notice, such owner or owners shall be deemed guilty of a misdemeanor, and shall, on conviction in the Police Court of said District, be punished by a fine of not less than one dollar nor more than five dol-

lars for each day he, she, or they fail or neglect to make such connections.

SEC. 4. That in case the owner or owners of any such lot be a non-resident or non-residents of the District of Columbia, or can not be found therein, then, and in that case, the said Commissioners shall give notice, by publication twice a week for two weeks in some daily newspaper published in the city of Washington, to such owner, directing the connection of such lot with such public sewer or with such public sewer and water main, as the case may be: *Provided, however,* That if the residence or place of abode of the said non-resident lot owner be known or can be ascertained on reasonable inquiry, then, and in that case, a copy of the aforesaid notice shall be mailed to said non-resident, addressed to him in his proper name at his said place of residence or abode, with legal postage prepaid; and in case such owner or owners shall fail or neglect to comply with the notice aforesaid within thirty days it shall be the duty of said Commissioners to cause such connection to be made, the expense to be paid out of the emergency fund; such expense, with necessary expense of advertisement, shall be assessed as a tax against such lot, which tax shall be carried on the regular tax roll of the District of Columbia, and shall be collected in the manner provided for the collection of other taxes.

Approved, May 19, 1896. (29 Statutes, 125.)

ASSIGNMENT OF ERRORS

1. The court below erred in holding that the formal answer of the Commissioners, sworn to by them, could not properly be considered as a part of the return.

2. The court below erred in holding that the appellee did not receive the notice required by the Act.

3. The court below erred in giving judgment for the appellee, and in ordering the assessment against the property of the appellee to be quashed.

4. The court below erred in holding the said assessment to be illegal and void.

5. The court below erred in ordering the said assessment to be quashed.

6. The court below erred in holding (if it can be said to have held) that the said Act is unconstitutional and void.

ARGUMENT

I.

THE SWORN ANSWER OF THE COMMISSIONERS IS A PROPER PART OF THE RETURN.

The assertion of counsel for the appellee that nothing is to be considered as part of the return in this case except the copies of official papers filed, has the merit of novelty, at least.

It has been the custom of the District of Columbia for so many years that it might almost be called an immemorial custom, to make its returns as made here, or in similar form. It has never, until this moment, been disputed, that the Commissioners had the right to make a sworn return and have that considered by the Court, except in one other case where the contention was overruled. To hold that the Commissioners of the District may not make explanations or sworn statements as to their official records, or add to matters not fully covered by the bare production of documents in a given case, would be a plain denial of justice. It would be placing them in a worse position than any other litigant is ever placed.

The rule upon this subject, as laid down in 4 Enc. Pleading and Practise, pp. 211-212, is as follows:

XII. THE RETURN OR ANSWER.—1. DEFINITION AND DISTINCTION BETWEEN TERMS.—The court, board, or tribunal, to which the writ of certiorari is directed, in obedience to the command of the writ, makes a formal transcript of its record, or such portion thereof as is designated in the writ; and in *addition to such transcript*, when required to do so, or when it is *otherwise permissible and expedient, a statement of such matters relative to its proceedings as are not contained in its record*, and transmits the same to the court issuing the writ. Such transcript and statement are called the return, and sometimes, though not with strict propriety, the answer.

Part I, therefore, of the return, in so far as it states matters of fact, is to be taken as an official return.

Worcester, &c., R. Co. v. R. R. Com'rs., 118 Mass., 161.

Tested by this rule, was it not *expedient* or *permissible* for the Commissioners to state that a copy of the advertisement had been sent by registered letter to the petitioner? If not, why? The law requires it, and if the fact can be shown, why should not it be allowed in whatever mode it may be done? The records show that something was sent by registered mail to the petitioner. The law requires a copy of the advertisement to be sent. What was actually sent, if not this? Does the law exclude the testimony of those who know? We submit that it is not possible.

Complaint is also made that the return shows that a "parcel" was sent, and not a letter. Is an im-

portant case like this to be concluded because a post-office clerk, in the hurry of work, inadvertently erased the word "letter" instead of "parcel," in the place on the return card where they stand together? And are the Commissioners to be concluded by such a mistake on the part of one not in their employ? We repeat, that in our opinion, such a rule is impossible.

The rule is thus stated in 6 Cyc., 804:

"5. What May be Returned.—*a.* In General.—The return must contain everything commanded by the writ or required by the practice, and must disclose something on which the reviewing court can act. It should contain specific statements of fact, not conclusions or opinions, and must be sufficient to enable the reviewing court to pass on the legality of the proceedings."

"Where the rules of the common law are adhered to, the writ brings up, and the return can only properly include, the record, or *proceedings* or orders *in the nature of a record* upon which the determination which is the subject of review was made."

Was not the statement of the defendant that it sent a copy of the advertisement a "proceeding" in "the nature of a record?" Is it not a very important part of the record? The petitioner does not suggest diminution of the record, i. e., that the respondent has omitted something vital to her case, nor that the respondent is stating something irrelevant. On the contrary, she complains that the respondent is stating too much, and that concerning a vital point in the case. How a court of justice could view with disfavor a full statement about a vital point, is incomprehensible.

Harris on Certiorari, says, p. 11, sec. 10:

“The return to the writ must embrace what is commanded to be sent up, if it is in the power, custody, and control of the party to whom it is directed; if not, he will be excused. And in the proper case, when not full and complete, the return to the writ of certiorari may be amended.”

The return must be full and complete. Would the return in this case be full and complete if it were not accompanied by the statement of the respondent of what was sent to the petitioner by registered mail? Suppose, for the sake of argument, that the shoe was on the other foot, and that it was absolutely essential to the *petitioner's* case to show that a copy of the advertisement was sent by registered mail. Would she not be very prompt to suggest diminution of the record, and would not the Court just as promptly compel a statement from the respondent of what it was that was sent by registered mail, if only the return card was filed unaccompanied by such a statement? There can be no doubt about this; nor can there be any doubt, we submit, of the right of the respondent in this case to make such a statement which is in its favor.

Harris also says, p. 217, sec. 306:

“Where a certiorari was granted by the Supreme Court of New York, it was held that the return by the inferior court must contain so much of the facts of the case as would enable the court to determine whether the inferior tribunal had jurisdiction of the matter in hand, and that the trustees of a village, in that case, incorporated and authorized to widen streets, provided such streets do not run across or over the site of houses or buildings, the expense of removing of

which will exceed \$100, were bound to return whether or not it was known to them at the passage of the resolution for widening the street that such improvement would interfere with a building, the removal of which would cost more than \$100."

Starr v. Rochester, 6 Wend., 565.

This is exactly the case at bar, in principle. The trustees were required to state a matter of knowledge, other than a mere matter of record in a public document. It was vital to the case and the court required it. Will the Court ignore it in this case, when already made?

If anything more were needed upon this discussion it might be found in two cases decided by this Court:

Padgett v. District of Columbia, 17 App., 255.

Guy v. District of Columbia, 25 App., 117.

These were cases brought to quash taxes and assessments alleged to be illegal. Both were certiorari. Instead of making return to the writ, the District filed a *motion to quash and dismiss the writ* and in support of the motion filed an *ex parte* affidavit of the Commissioners giving their reasons. There was not a single official paper, document, copy of or part of any such filed in either of these cases. Merely a motion to dismiss supported by the *ex parte* affidavit. Yet in both cases the motion was granted, and the Court of Appeals sustained the judgment and affirmed this practise of allowing affidavits. If *ex parte* affidavits are to be thus allowed in support of a motion to dismiss the writ, why should not, with a great deal more reason, the formal answer of the Commissioners under oath be permitted to stand in support of the official records and copies filed by them in this case? Especially when, as here, the statement is upon a vital point

in the case, and would be compelled by the Court if it were necessary to the justice of the petitioner's case. Is justice a different thing when it is sought by a plaintiff in a case than when it is offered by the defendant? Especially when there is no denial of the truth of the statement offered, or any suggestion of it?

The writ itself in this case requires the defendant to certify "all minutes or *proceedings* had by said respondent or the Commissioners of the District of Columbia, as a board or otherwise, concerning said matter."

The return, including part 1, is in strict conformity to the command of the writ, and is, therefore, entirely proper.

Other cases are noted which, plainly, support the necessity for a full and complete return.

Carr v. State, 103 Ind., 548.

Action to enforce payment of an assessment:

"The special finding states that service of notice was made by affidavit showing that notices were posted. It was sufficient to give notice by posting as the statute provides. It is competent for the legislature to provide what kind of notice shall be given, and where the notice is of the character prescribed by statute it is sufficient. * * *

Where the court acts upon the notice, it is not necessary to make a formal entry declaring it to be such as the law requires. The action of the court is sufficient without any formal order approving the notice." (P. 548.)

See also *Updegraff v. Palmer*, 107 Ind., 181:

"It is not sufficient to state that notice was

given. The return must state what notice was given, and how, and when it was served."

People v. Burnap, 38 Mich., 350.

Daniels v. Smith, 38 Mich., 660.

Rathbun v. Sawyer, 15 Wend., 451.

Action to review the finding of a court-martial:

"The facts or evidence before the court are not to be returned any further than necessary to enable this court to determine upon the point of jurisdiction or other question of law arising in the course of the proceeding."

Forbes v. Delashmutt, 68 Iowa, 164.

Certiorari to review the findings of commissioners called to condemn a right of way:

"If we concede that they constitute a tribunal exercising judicial functions within the meaning of the statute, they did not exceed their jurisdiction nor act illegally. Their function pertains merely to the matter of assessment. * * * The commissioners were the only ones who could be said to be doing that" (exercising judicial functions) "and as their answer shows that they kept within the lawful sphere and proceeded regularly, so far as they were concerned, we have to say that we think that the demurrer to their answer was properly overruled." (P. 167.)

Levant v. Com'rs., 67 Me., 429.

Certiorari to county commissioners to quash an assessment:

"The respondent tribunal filed an answer under oath setting * * * a copy of the record. If the original record be defective, it may be amend-

ed by the tribunal, in accordance with the facts at any regular session. If it do not contain a full detailed statement of the facts (with evidence) pertinent to the rulings thereon, so far as the points complained of in the petition are concerned, so as to enable this court to determine the questions of law raised, such omissions should be supplied in the answer. When completed and sworn to by the members of the tribunal, whose proceedings they are, the answer being in the nature of a return, is conclusive as to matters of fact within its jurisdiction. If the tribunal does not appear and file their answer so that the case may be decided upon its merits; the wilful refusal to make a full statement of facts and rulings; this court having full power to correct abuses as well as errors may require such statement to be certified together with the record." (P. 435.)

Gerdes v. Chapman, 108 Ill., 137.

Certiorari to a justice of the peace to send up certain proceedings in regard to laying out a way. Only part of the proceedings were within the control of the justice:

"The only intelligent manner in which the action of the supervisors could be passed upon and determined would be to bring up the entire record of the proceedings had in regard to the road, from the commencement down to and including the last final order." (P. 142.)

THE CONSTITUTIONALITY OF THE ACT

As the judgment can not be sustained upon the ground that there was want of notice to the appellee,

it must be sustained, if at all, upon the theory that the Act is invalid. And while the trial justice did not so decide, yet he expressed his opinion, as was said before, that the Act was void because of its discrimination between owners of real estate in the District.

It was argued by the appellee, and presumably the court below took the same view, that there was some supposed analogy between the case of McGuire against the District of Columbia, 24 App. D. C., 22, and the case at bar. The Court said in that case, p. 33: "We can not have one law for the resident and another for the non-resident of real estate in the District." It is submitted that this expression must be confined to the facts of that case. It arose in a discussion by Mr. Justice Morris of the unreasonable discrimination made in the ice and snow law between the owners of improved property and the owners of vacant lots. Moreover, this law was an attempt to make owners and tenants clean off snow from sidewalks, the title to which was not in them. The Court intimated, p. 28, that the law was an attempt to shift the burden resting primarily upon the municipality, to the shoulders of the citizens.

The present case does not disclose these facts. The three first sections of the Act are absolutely uniform; there is not the slightest discrimination whatever. All owners of improved property are required, where there are sewers and water mains available, to connect with the same, under penalty of a fine for each day they neglect to do so.

The supposed discrimination arises in the fourth section of the Act where it is provided that if the owner be a non-resident of the District, or *can not be found therein*, then the Commissioners of the District shall give the notice prescribed by this section, proceed to do the work, and assess the cost thereof against

THE DISTRICT

the property. There is a discrimination here, but it is not a discrimination between a resident and a non-resident, but between those who can be found within the District and those who can not be so found. The first class are coerced into obedience of the law by fine, to be repeated for each day's neglect to have the work performed which is required by the statute. The second class can not be so coerced, for the reason that they can not be served with process within the District, and so, no personal judgment can be rendered against them. Some other means must, then, be resorted to to accomplish a very necessary work of drainage, which plays an exceedingly important role in the health of every community. The Congress has provided a proceeding *in rem*, against the property itself, the owner not being accessible. It is necessary that the work should be done, the law requires it to be done, and it has not been suggested, and will not be here, that Congress is without the power to so require it to be done. Is there any other way in which the end desired can be attained, the owner being inaccessible? We know of none and none has been suggested.

But, the appellee insists, the owner who can be found can not have the work done for him, and thus have his property assessed; while the owner who can not be found does have the work done for him and has his property assessed, and there is discrimination in this difference. The answer to this argument is, that the first three sections of the Act are without doubt constitutional, as this Court recently decided in the law relating to the removal of weeds from lots, which law is very similar to the present law; and that the discrimination is not unreasonable. The question is, not whether there be discrimination, as the appellee seems to suppose, but whether the discrimination be unreasonable. The Supreme Court has repeatedly

said that to render a law obnoxious in a constitutional sense the discrimination contained therein must be an unreasonable one. The cases are cited later.

Generally speaking, all laws contain discriminations. The Act of February 2, 1899 (30 Stat., 812), commonly known as the "Smoke Law," was sustained by this Court in *Moses against the United States*, 16 Appeals, 428, and practically by the Supreme Court of the United States in its refusal to grant a writ of certiorari in the *Sinclair* case. In this law it was declared a nuisance to emit dense or thick black or gray smoke. A continuous stream of smoke might be emitted from a chimney for twenty-four hours of the day around without violating the law, provided it were not thick or dense, and it might cause as much or more discomfort than a dense column of smoke emitted for a short time. The latter would be a violation of the law. Or the smoke might be exceedingly dense, but if it were brown, as is sometimes the case, or if it were yellow, as is also sometimes the case, or if it were any other color than black or gray, running the whole gamut of the rainbow, it would not be punishable under this statute. Or if it were emitted from an engine not stationary, however injurious it might be to the health and annoying to the comfort of the community, it would not be a violation of the law. And it is a well-known fact that railway locomotives actually cause more annoyance by their emission of dense smoke than any other class or classes of engines in this city. Again, the statute makes an express exception of houses used exclusively for private residences. Here is discrimination of a gross character between the owners of real estate. One man, having a large dwelling, may emit from his chimneys any kind and any quantity of smoke without fear of being punished. His next-door neighbor, owning a small shop, not used as a dwelling, may not cause any dense

or thick black or gray smoke to be emitted from his chimneys without being liable to a fine. Again, the Act is applicable to the *whole* of the District of Columbia, not to the city of Washington, nor to densely populated portions of the District, but to the outlying farms, truck gardens, and waste places with equal force.

The foregoing remarks are submitted, and they might be amplified, merely for the purpose of showing that it is not difficult to pick flaws in any important statute, and for the purpose of illustrating the statement that it is not discrimination that the laws forbid, but only unjust discrimination.

The law under discussion in the case at bar is a much more important one to the health and comfort of the community than the smoke law. The day when filthy cess pools and box-privies are permitted in a large and crowded community, where there is ample sewer accommodation and an abundance of pure water at hand, has gone by. No city ought or would tolerate such conditions under such circumstances for a moment. Such places are prolific sources of disease, in addition to being disagreeable to the senses, and if they are permitted to exist, the elaborate machinery of a large municipality, maintained at much labor and cost, for the proper preservation of the health and comfort of the community, must be largely nullified and ineffective. Nor is it to be permitted to a stranger, residing at a great distance and far removed from such sources of contamination, to tell us that such a law is harsh, unequal, and unjust. We say to such: If you will not remedy this filthy condition, we will, and make you pay for it. We say the *same thing to all persons in the same situation*, and this is the test of the law. Are all persons in the same class treated alike, and is the division into classes a reasonable one? To the first half of this question the

answer has been made. The law requires the work to be done for all persons who can not be found in the District. To the second half of the question—is the division into the two classes a reasonable one, one which the Congress might well require, those who can be found and those who can not be found within the District—we answer by a citation of cases from various sources, principally from the Supreme Court of the United States, which, it is thought, answer emphatically in the affirmative. The Supreme Court, it is submitted, has sustained a large number of cases from the various states, covering a wide range of subjects, which for character and amount of discrimination in the different laws involved, far exceed anything that can be brought against the law under discussion in this case.

THE AUTHORITIES

RESIDENTS OF TERRITORIES AND RESERVATIONS—
These prohibitions do not prevent Congress from giving residents of unorganized territories and Indian Reservations privileges and immunities not accorded non-residents therein.

(8 Cyc., 1038).

This does not, however, prevent a state from taxing all companies doing a certain kind of business; from placing on foreign corporations a different tax from that placed on similar domestic corporations; from placing a different tax on corporate stock owned by a non-resident than the tax on such stock owned by a resident.

(8 Cyc., 1047.)

The state may provide a special method of valuation of lands belonging to non-residents, * * *

so to, it may provide the manner of charging the assessment and for notice to residents only in assessing omitted property.

(8 Cyc., 1048.)

The state may, however, discriminate between residents and non-residents in the remedies granted. Thus security of costs may be required of non-residents.

(8 Cyc., 1050.)

A greater tax may be placed on a foreign corporation than on a domestic one, nor does the payment of a tax on goods where shipped exempt them from taxation where they are sold.

(8 Cyc., 1071.)

And different means for the enforcing the collection of taxes.

(8 Cyc., 1071.)

Frose v. Brisbin, 19 Wend., 11:

A person domiciled in New York, who carries on and personally superintends his business out of the state, is not a resident, and is subject to arrest for debt. Resident not liable.

Hawley v. Hurd, 72 Vt., 122:

A statute which exempts from attachment negotiable paper held by a bank within the state, does not work a discrimination against banks without the state, under Art. IV. sec. 2, Fed. Court.

McFadden v. Blocker, 54 S. W., 872:

A statute of Arkansas, by Congress extended to Indian Territory, which provides that mortgages of chattel mortgages executed by non-

residents, shall take possession in order to secure a lien as against third parties, while those executed by residents need only be recorded where the mortgagor resides, does not infringe Art. IV, Sec. 2.

Chemung Canal Bank v. Lowery, 93 U. S., 72:

A statute of Wisconsin providing that the statute of limitations shall not run against a defendant who is out of the state if he resides within the state, but shall, if he resides out of the state, is not repugnant to Art. IV (Equal privileges and immunities).

An executor appointed in New York, who is a non-resident, can not bring an action of tort there against a foreign corporation upon a cause of action which did not arise within the state. Residents of the state may.

Robinson v. Oceanic, &c., Co., 112 N. Y., 315.

Central R. R. v. Ga. Co., 32 S. C., 319.

Tatem v. Wright, 23 N. J. L., 429:

Tax upon agents of non-resident corporations held to be valid. No such tax on agents of resident corporations.

Id. Ins. Co. v. Com., 5 Bush., 68 (79).

Id. Ins. Co. v. N. O., 1 Woods, 85.

Conn. v. Ins. Co., 73 Conn., 255:

Different method of taxing resident and non-resident stockholders whereby the latter were compelled to pay a higher rate. Held constitutional.

Cribbs v. Benedict, 64 Ark., 555:

Assessments for digging ditches to be collected against a resident by proceedings in the circuit

court, and against a non-resident by a tax on the land—not an infringement of Art. IV, Sec. 2, U. S. Constitution. (563.)

Pace v. Alabama, 106 U. S., 583:

Syllabus: Section 4189 of the Code of Alabama, prohibiting a white person and a negro living with each other in adultery or fornication, is not in conflict with the Constitution of the United States, although it prescribes penalties more severe than those to which the parties would be subject, were they of the same race and color.

American Sugar Refining Co. v. Louisiana, 179 U. S., 89:

Syllabus: A state imposing a license tax upon persons and corporations carrying on the business of refining sugar and molasses does not, by exempting from such tax "planters and farmers grinding and refining their own sugar and molasses," deny sugar refiners the equal protection of the laws within the Fourteenth Amendment.

8 Cyc., 1073:

The Fourteenth Amendment was intended to secure equality of rights to all people; and this includes equal exemption with others of the same class from all charges and burdens of every kind, although a law *may discriminate* in favor of a certain class, and if *founded upon a reasonable distinction in principle*, it does not deny the equal protection of the laws.

8 Cyc., 1076:

The punishment for the same offense must be the same for all persons in the same class. This does not prevent the legislature from providing

a *special punishment for a class of offenders* or increase the punishment of previous offenders, &c.

Merchants' Bank *v.* Pennsylvania, 167 U. S., 461:

A statute permitting banks to pay eight mills on the dollar of its capital stock at par if it is paid before the first of March; and if not, to pay four mills on the actual value, does not infringe the Constitution of the United States.

Brewer, J. P., 463: "If a bank has a large surplus, and its stock in consequence, worth five or six times its par value, naturally it elects to collect and pay the eight mills, and thus in fact it pays at a less rate on the actual value of its property than the bank without a surplus, and whose stock is only at par. So it is possible, under the operation of this law, that one bank may pay at a less rate upon the actual value of its banking property than another; but the banks which do not make this election, whether state or national, pay more than the regular tax. The result of the election under the circumstances is simply that those electing pay less. *But this lack of uniformity in the result furnishes no ground of complaint under the Federal Constitution.* * * *

"Again, it will be perceived this inequality in the burden results from a privilege *offered to all*, and in order to induce prompt payment of taxes and payment without litigation."

Pacific Express Co. *v.* Seibert, 142 U. S., 339; p. 351:

This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not incon-

sistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its condition or class, will be destructive of the principle of uniformity and equality in taxation and of the just adaptation of property to its burden."

Charlotte, etc., R. R. v. Gibbs, 142 U. S., 386:

The property of railroads in South Carolina is subjected by the general law to the same tax as similar property of individuals, in proportion to its value, and like conditions of uniformity and equality in its assessment are imposed. A further tax is laid upon them to meet the expenses and salaries of the railroad commissioners is not in proportion to the value of the property, but according to the gross income proportioned to the number of miles of their roads in the state.

It was objected that the tax to pay for the services of the railroad commissioners was illegal and not uniform.

"The railroad commissioners are charged with a variety of duties in connection with the railroad, the performance of which is of great importance in the regulation of those instruments of transportation."

Held, that the tax was valid.

Columbia Southern R. R. v. Wright, 151 U. S., 470 (478):

The transitory or unlocated personal property of the railroad was distributed among the counties of the state for taxation and taxed by the counties at different rates. It was objected that

this method was unjust discrimination, but the Court held that it was not.

Thomas v. Gay, 169 U. S., 264:

Personal property (cattle) in unorganized districts were taxed in the county to which the districts were attached for judicial purposes. Held, legal. The cattle were largely the property of non-residents driven in for grazing purposes.

A vessel enrolled and licensed under the laws of the United States may be forfeited for disobedience, by those on board, of a state law regulating the taking of oysters.

Smith v. Maryland, 18 How., 71.

The police power "is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, or whatever may be regarded as a public nuisance," etc. (P. 136).

Lawton v. Steel, 152 U. S., 133.

In this case the Court upheld the destruction of fish nets used in violation of a game law.

A statute of Kansas prohibiting the manufacture and sale of intoxicating liquor was held not to be in violation of the Fourteenth Amendment.

Mugler v. Kansas, 123 U. S., 623 (see p. 628).

In *Holden v. Hardy*, 169 U. S., 366, a law of Utah restricting the hours of labor to eight in institutions for the refining and smelting of ores, was held to be constitutional. Otherwise, as to bakers—

Lockner v. N. Y. 198 U. S., 45.

In *L'Hote v. New Orleans*, 177 U. S., 587, an ordinance of New Orleans, prohibiting any lewd or abandoned woman from occupying, inhabiting, living, or sleeping in any room, outside of certain defined limits, was upheld as a valid exercise of the police power.

In *Petit v. Minnesota*, 177 U. S., 164, a statute of Minnesota was upheld which forbade labor on Sunday except works of necessity and charity, and declared that hair cutting and shaving on Sundays were not such, as applied to barber shops kept open for that purpose.

In *Austin v. Tennessee*, 179 U. S., 343, the Supreme Court declared that it would not take judicial notice of the fact that tobacco was more noxious in the form of cigarettes than in any other; but the Court held valid a statute of the state of Tennessee prohibiting "any person, firm, or corporation, to sell, offer to sell, or bring into the state for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same."

In *St. John v. New York*, 201 U. S., 633, the Court held valid, as an exercise of the police power, a statute of the state of New York, prohibiting the sale of adulterated milk, in which non-producers of milk, selling that article, were held to an absolute standard and punished for selling milk below the standard fixed; but producers of milk, or those selling milk from their own herds, were not held if the milk was of the same quality as it came from the herd.

"In the one case the source of the milk can be known and the tests of the statute applied; in the other case it would be impossible, except in a few instances." (P. 638).

In *Savannah, etc., Ry. v. Savannah*, 198 U. S., 392, the Court held valid an ordinance of the city of Savannah taxing street railroads within the city, while not taxing a steam railroad which had branch tracks in the city and charged extra for local deliveries of freight, most of the business of the steam road being doing out of the city.

New Orleans Gas Co. v. Drainage Co., 197 U. S., 453:

The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised (P. 460).

In this case the Gas Co. was compelled to change the location of its pipes, at its own expense, to accommodate the plans of the drainage commission. The Gas Co. claimed that it had the right under its charter to the use of the streets and highways and any change made should be at the expense of the commission. The Court sustained its right to the use of the streets, and, in a prior case to the exclusive privilege of supplying gas to the city, but held it was required to change the location of its pipes at its own expense.

Field v. Barber Asphalt Co., 194 U. S., 618:

Discrimination between residents and non-residents. A statute of Missouri was upheld which denied to non-residents the right to protest against paving improvements.

Hayes v. Missouri, 120 U. S., 68:

Sustaining a statute allowing fifteen peremptory challenges to the jury in some cities, and in other cities but eight; the cities being divided into classes.

Magoun v. Bank, 170 U. S., 283:

Sustaining an inheritance tax law of Illinois which taxed strangers to the estate more than relatives, and relatives unequally.

“A law must be framed and judged of in consideration of the practical affairs of man. The law can not give personal notice to its provisions or proceedings to every one. It charges every one with notice of its provisions; of its proceedings it must, at times, adopt some form of indirect notice, and indirect notice is usually efficient notice when the proceedings affect real estate. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings, indeed must frame them, and assume the care of property to be universal, if it would give efficiency to many of its exercises.”

Ballard v. Hunter, No. 7, Advance Sheets, 269.

It is respectfully submitted that the judgment should be reversed.

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